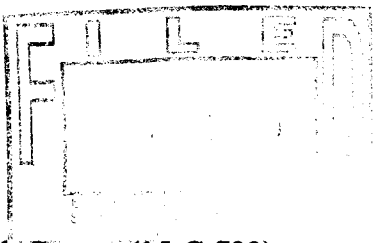
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0075



SARAH L. BIRCHFELD,
Plaintiff Below, Petitioner

vs.)

Appeal from a final order
of the Circuit court of Raleigh County (15-C-733)

ZEN'S DEVELOPMENT, LLC,
a West Virginia limited liability company;
UPTOWN PROPERTIES, LLC,
a West Virginia limited liability company; and
KENNETH W. MCBRIDE, JR.
an individual,
Defendant Below, Respondents

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

I. The Circuit Court erred when it concluded: "Since there are no statutes in West Virginia pertaining to party walls, the case law in West Virginia dealing with party wall rights and duties is limited. Therefore the Court was required to look to other jurisdictions for guidance in determining the governing law in this case."

II. The Circuit Court erred when, in adopting party wall duties from Kansas and Washington State for the common law of West Virginia and then applying them in this case, it conflated two separate and distinct party wall duties expressed in those jurisdictions into a single duty.

III. The Circuit Court erred when it found that the party wall in the instant case is not structural because Petitioner's uncontested expert testimony is that the party wall is structural.

IV. The Circuit Court erred when it concluded that the burning of a building subject to party wall servitudes as a matter of law fulfills that building owner's the duty to "give notice of the intended removal" of his building to the other party wall owner.

V. The Circuit Court erred when it found that "[i]n the present case, the Plaintiff has failed to identify the party or person(s) that undertook the removal of the damaged building on the Defendants' side of the party wall."

VI. The Circuit Court erred when it entered summary judgment in favor of Respondent McBride whether (1) McBride "use[d] reasonable care to protect the structural integrity of the party wall" and (2) McBride "avoid[ed] damage to the adjoining owner's building resulting from the removal" because the lower court had not heard the testimony of Petitioner's expert witness.

VII. The Circuit Court erred when it failed to enter summary judgment in favor of Petitioner whether Respondent McBride (1) "use[d] reasonable care to protect the structural integrity of the party wall" and (2) "avoid[ed] damage to the adjoining owner's building resulting from the removal" — embracing two separate and distinct party wall duties — because the testimony of Petitioner's expert witness on these two matters of scientific opinion is undisputed.

VIII. The Circuit Court erred when it entered summary judgment in favor of Respondents McBride and Uptown Properties on Petitioner's negligence claim on the incorrect finding that those Defendants had no duty to Petitioner to protect Respondents' one half of the party wall from the elements and thus ultimate failure and collapse.

IX. The Circuit Court erred when it entered summary judgment in favor of Respondents McBride, Uptown Properties and Zen's Development on Petitioner's party wall claim on the incorrect finding that those Respondents had no duty to Petitioner to protect Respondents' one half of the party wall from the elements and thus from failure and ultimate collapse.

X. The Circuit court erred when it failed to find *prima facie* negligence by each of Respondents because of their violations of the Ordinances of the city of Beckley, West Virginia, including the following:

a. Section 3303.4 Vacant lot. Where a structure has been demolished or removed, the vacant lot shall be filled and maintained to the existing grade or in accordance with the ordinances of the jurisdiction having authority.

b. Section 3303.5 Water accumulation. Provision shall be made to prevent the accumulation of water or damage to any foundations on the premises or the adjoining property.

c. Section 3307.1 Protection required. Adjoining public and private property shall be protected from damage during construction, remodeling and demolition work. Protection shall be provided for footings, foundations, party walls, chimneys, skylights and roofs. Provisions shall be made to control water runoff and erosion during construction or demolition activities . . . [Written notice shall be given to the "owners of adjoining buildings"].

d. 1502.1 Protection Required. Adjoining public and private property shall be protected from damage during construction and demolition work. Protection must be provided for footings, foundations, party walls, chimneys, skylights and roofs. Provisions shall be made to control water runoff and erosion during construction or demolition activities. The person making or causing an excavation to be made shall provide written notice to the owners of adjoining buildings advising them that the excavation is to be made and that the adjoining buildings should be protected. Said notification shall be delivered not less than 10 days prior to the scheduled starting date of the excavation.

XI. The Circuit court erred when it entered summary judgment in favor of Respondents McBride and Uptown Properties on whether they acted reasonably in directing or permitting surface water to flow into the Petitioner's building on the adjoining lot.

STATEMENT OF THE CASE

Petitioner Sarah L. Birchfield and Respondents share a single structural party wall built in 1919 that once supported both of their adjoining commercial buildings built at the same time in downtown Beckley. Birchfield's Lot 4 and Respondents' Lot 5 on Neville Street are subject to mutual party wall agreements, dated 1919, that run with the land. Those agreements remain in effect. In 2008, the building on Lot 5, then owned by Respondent McBride, burned down. Respondent McBride removed the building debris, exposing the party wall to the elements and

permitting surface water from Lot 5 to enter into Birchfield's basement on Lot 4. In 2008, Respondent Uptown Properties bought Lot 5 and built an outdoor elevated wood patio deck for its restaurant on Lot 6 that attached to the party wall. Later, fire also destroyed the patio deck. In 2012, former defendant, Harper Rentals, Inc.[1] acquired Lot 5 and removed the patio deck without repairing the party wall that had supported it. In 2015, Respondent Zen's Development, LLC, the current owner of Lot 5, filled in the land without complying with Beckley's building code requiring protective measures for party walls and adjoining lots. It too has failed to report the party wall.

The party wall, once protected from water and the elements, now is exposed them. Birchfield's structural engineer, Daniel R. Shorts, gave expert opinions that the party wall is structural; if unmitigated, the party will collapse because it has become exposed to water and the elements when it was not constructed for that purpose; water from Lot 5 is flooding Birchfield's basement; the exposure of the party wall is the direct and proximate cause of Petitioner's damage; Birchfield's building is uninhabitable; and the estimated cost of repair to the party wall is nearly $250,000. Shorts opined: "Based on my examination and my knowledge as a structural engineer, it is my expert opinion that the demolition and removal of the building formerly on 324 Neville Street have substantially and materially damaged the Party Wall and other structural elements of the Subject Property." Birchfield's expert appraiser, Darrell Rolston opined and testified that her building is a complete loss to her and represents a continuing liability for her.

SUMMARY OF ARGUMENT

Respondents argued below that because the party wall agreement is silent on the owners' obligations to protect the party wall from the elements, Birchfield can have no compensable claim

[1] Former defendant, Harper Rentals, Inc. is not a Respondent.

for damages they caused or are permitting to occur. Birchfield liability claims against Respondents are not based on contract but they sound in tort duties in negligence and arising from their party wall relationship. The lower court confined its rulings to the nature and extent of tort duties on Respondents, but, in a number of errors, incorrectly found that West Virginia law is silent on pertinent party wall duties, expressed new rules for the case from other jurisdictions and a real estate law treatise and, then, incorrectly applied the new rules to case. In so doing, the lower court incorrectly entered summary judgment against Birchfield and in favor Respondents concluded that Respondents had no duty to protect the party wall from water and the elements. The lower court's decision improperly cuts off Birchfield's right under the 100-year-old party wall agreement and within the party wall relationship while also precluding Respondents' liability for the immense damages their acts and omissions wall have caused her. The lower court let all three Respondents off the hook on Petitioner's party wall claims and all but Respondent Zen's Development on her negligence claims.

Birchfield asserts that the law of party walls in West Virginia recognizes Respondents' duty to protect a structural party wall from damage. Petitioner further asserts that West Virginia's law of party walls imposes on each of Respondents a duty to protect the party wall from the elements. This duty, Birchfield asserts, by agreement runs with the land and binds successive owners without diminishment or end merely because one party wall obligor no longer desires to use the party wall.

Despite Petitioner's invitation, the lower court declined to analyze the existing law of party walls in West Virginia within the class of property law known as servitudes even while the lower acknowledged that the party wall obligations run with the land. Rather than follow and extend West Virginia precedents in the law of party walls, the lower court crafted new rules expressly

borrowed from Kansas and Washington and an especially conflicting rule, cited in 2 *Thompson on Real Property*, that unfairly reduces a party wall obligor's duty not to damage a party wall merely because one obligor no longer wishes to use the party wall.

Further, the lower court concluded that absent contractual duties, an obligor can remove its building subject to a party wall so long (1) as notice is provided, (2) reasonable care is taken to protect the structural integrity of the party wall; and (3) the removal does no damage to the adjoining building and its contents.

Had the lower court applied the new rule to the facts of the instant case, Petitioner should have prevailed: (1) No notice was given to Petitioner; (2) Petitioner's expert structural engineer testified that reasonable care was not taken to protect the structural integrity of the party wall and that, inevitably, the entire party wall fail; and (3) Petitioner's building is provably damaged, including with water flooding its basement.

But, the lower court erred in applying the new rule to the facts of the case by conflating the latter two duties, and despite the uncontested testimony and opinion of Petitioner's expert structural engineer, granting summary judgment against Petitioner and for Respondents on party wall duties. Compounding its error, the lower court then adopted a severe limitation on the operability of the new rule with yet another new rule drawn from 2 *Thompson on Real Property*: A party wall obligor that removes its building subject to a party wall in doing so has no duty to protect the party wall from the elements.

None of these rules harmonizes with West Virginia's existing law of party walls. The result is that the lower court has tied Petitioner's claims up on this ball of tangled errors, leaving a bereft Petitioner her only intact claim for negligence against Respondent Zen's Development, Lot 5's current owner. The lower court further limited Petitioner's cause of action by limiting its

negligence duty only to whether the current owner negligently filled in Lot 5, affecting Petitioner's case of a *prima facie* breach of the standard of care for its failure to follow Beckley's building regulations.

Even though Respondent McBride's fire loss on Lot 5 was insured, Respondent Uptown Properties bought a vacant lot and attached a new structure to the party wall and Respondent Zen's Development filled in a vacant lot in a manner that directs surface water through the party wall into Birchfield's basement, the only claim that the lower court retained was for that for negligence against the current owner of the lot, Respondent Zen's Development and then only on whether Zen's Development, the current owner of Lot 5, negligently filled in Lot 5 that directed surface water in the building on Lot 4.

In sum, the lower court has rendered worthless a century-old party wall relationship that continued to serve Petitioner in its original purpose. To endorse the lower court's view, Respondents can elect to use or abandon the party wall at will while escaping all obligations for it. West Virginia law gives Petitioner causes of action in tort in both party wall and negligence duties. Yet, the lower court declined to acknowledge and extend existing West Virginia law while adopting in error altogether new rules inconsistent with West Virginia law while enforcing the new rules in error too.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that this case merits oral argument under either Rule 19(a)(1), (3) or (4) or Rule 20(a)(1) of the West Virginia Rules of Appellate Procedure. The lower court concluded that the law of party walls within the jurisprudence of West Virginia was inadequate or silent to the circumstances presented in this case. Petitioner disagrees. The lower court looked to other jurisdictions for guidance and fashioned a rule based on decisional law in Kansas and Washington

and a particularly egregious rule borrowed from a treatise, 2 *Thompson on Real Property*, that essentially permits one party wall obligor to abandon a party wall relationship when its building burns down and it no longer uses the wall. Petitioner believes that the rules of the case fashioned below ignore and, in the instance of the rule drawn from 2 *Thompson on Real Property*, contradicts West Virginia's precedents on party wall obligations.

Further, if a new or refined rule is necessary, then lower court declined to rely on the developed body of the law of party walls as a class of servitudes In addition to correcting the lower court's numerous errors, this case gives the Supreme Court the opportunity to develop the law of servitudes in West Virginia and to explore the issues during oral argument.

Last, the case merits oral argument under Rule 19(a)(3) because the lower court entered summary judgment against Petitioner and in favor of Respondents on party wall liability by applying its new rules in error and also against the weight of evidence in favor of Petitioner.

ARGUMENT
Statement of Facts

In 2007, Petitioner, Sarah Birchfield purchased an historic, two-story commercial building, built in 1919, on Lot 4 at 322 Neville Street, Beckley[2] in Raleigh County ("Lot 4") with much of her life savings. A.R. 0654-0656. Birchfield bought the building to lease it for commercial use on

[2] Petitioner's property is shown on a plat entitled "Map of Beckley Block, Beckley, W. Va., 1913" and recorded in the office of the Clerk of the County Commission of Raleigh County, West Virginia, in Deed Book 56, at page 247 (the "1913 Plat"). Birchfield acquired the Subject Property by a deed from Hylton Realty & Investments, LLC, dated August 14, 2007, and recorded in the office of the Clerk of the County Commission of Raleigh County, West Virginia, in Deed Book 5028, at page 2195.

the first floor and residential on the second. Adjacent to Lot 4, Lot 5 also contained an historic two-story commercial building. Respondents in succession owned Lot 5, abutting Lot 4.[3]

Since 1919, Lots 4 and 5 have been subject to party wall agreements[4], true copies of which is set forth in A.R. 0118-0119 (collectively the "Party Wall Agreement"). The Party Wall Agreement provides that each owner of Lot 5 and Lot 4 owns "one-half of said 18-inch wall and strip of land on which it is being built, with the right to join said wall and to the use of said wall as a party wall." A.R. 0118-0119. The Party Wall Agreement further declares: "The wall to be a party wall and as such to be a part of each building (when building is erected on lot 5) and the title to which shall pass by deed to each of said lots." A.R. 0118-0119.

In 2008, the building on Lot 5 burned and was demolished and cleared of its debris. The loss of the building on Lot 5 was an insured event for which the owner was compensated but for which Birchfield was not compensated for damages to the party wall shared by them. Birchfield A.R. at 25. Respondent McBride owned Lot 5 when the building burned and removed the building. Respondent Uptown Properties acquired Lot 5 as a vacant lot and constructed a wooden structure to the exterior wall of Petitioner's building as an outside facility to for customers of its bar and grill. Uptown Properties acquired Lot 5 with the wood elevated patio deck and later removed it, detaching it from the party wall and leaving the penetrations without repair. Respondent Zen's

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[3] (1) Respondent, Zen's Development, LLC, acquired Lot 5 by a deed from Harper Rentals, Inc., dated December 14, 2015, and recorded in the Clerk's office in Deed Book 5060, at page 7900; (2) Respondent, Uptown Properties, LLC, acquired Lot 5 by a deed from Kenneth W. McBride a/k/a Kenneth W. McBride, Jr., dated July 30, 2008, and recorded in the Clerk's office in Deed Book 5032, at page 4169; and (2) Defendant, Kenneth W. McBride acquired Lot 5 by a deed from William D. Kinder and Rhonda A. Kinder, his wife, dated March 5, 1992, and recorded in the Clerk's office on Roll 22, at page 356. Uptown Properties conveyed Lot 5 to Harper Rentals, LLC, formerly a defendant in the case below.

[4] The Party Wall Agreement was executed by Mabel L. Ross and Charles T. Ross, as owners of Lot 5, and Peter Lipari, as owner of Lot 4, dated June 12, 1919, and recorded in the Clerk's office in Deed Book 69, at page 352.

Development acquired Lot 5 during the pendency of the civil action below and filled earth in Lot 5 against the party wall. Petitioner instituted a civil action in the circuit court on July 30, 2015 and later amended her complaint to include Respondents as defendants.

There is no evidence in the record below that any of Respondents gave Petitioner notice of its intention to remove the building on Lot 5.

The Party Wall Agreement is not terminated and remains in force and effect.

The party wall itself largely, but not entirely, remains in existence. A.R. 0638. Based on the uncontested expert opinion and testimony of Daniel R. Shorts, P.E., a West Virginia licensed engineer who Birchfield retained in this civil action to serve as an expert in building systems and structure, the demolition of the building on Lot 5 exposed the party wall to the elements and the weather, and, further, permits surface water to flow over and from Lot 5, now vacant, and into the basement of the building on Lot 4. Birchfield engaged Mr. Shorts "in 2015 to conduct a visual inspection of the Subject Property and, in particular, its roof, its basement and its structural wall along the boundary with the adjacent vacant lot at 324 Neville Street." A.R. 0636.

Mr. Shorts further attested in his affidavit:

> I performed my initial inspection on November 3, 2016, and prepared a written report based on it, dated November 14, 2016. Upon her request, I later prepared a Remediation Report, dated November 17, 2016, the scope of which was focused on estimating the projected costs of two aspects: (1) repair and waterproof the Party Wall and Subject Property to a condition that would eliminate water infiltration and further deterioration of the structure; and (2) repair of the Party Wall and the Subject Property of damages caused by the demolition and removal of the adjacent structure at 324 Neville Street.
>
> Based on my examination and my knowledge as a structural engineer, it is my expert opinion that the structural wall, two stories high with a basement, of the Subject Property was constructed as and serves as a structural party wall for the Subject Property and for

the building formerly on 324 Neville Street (the "Party Wall" or the "Wall").

Based on my examination and my knowledge as a structural engineer, it is my expert opinion that, as of the date of my visual inspections, the Party Wall appears to be left in the condition it was in at the time of the demolition and removal. No patching, water sealing, coverings, or other means of water protection were observed along the exterior of the Party Wall. The Party Wall had numerous areas of exposed block and brick lacking joint material, cavity areas where stones or bricks once were, many holes caused by penetrations by bolts or like materials, and insets in brick that supported the demolished building's structural floor and room members.

Based on my examination and my knowledge as a structural engineer, it is my expert opinion that the structure next to the subject structure had been open to the weather for several years with no observable drainage in place. The demolition of the remaining structures between the Subject Property and Heber Street did not appear to include any drainage considerations. This ground appears to be graded in such a manner that precipitation will have no exit and can only pool or drain through the ground.

Based on my examination and my knowledge as a structural engineer, it is my expert opinion that the demolition and removal of the building formerly on 324 Neville Street have substantially and materially damaged the Party Wall and other structural elements of the Subject Property.

Based on my examination and my knowledge as a structural engineer, it is my expert opinion that the Party Wall is essential to the structural integrity and stability of the Subject Property. Without remediation, including repair and restoration, the Party Wall over time will deteriorate further and fail.

Based on my examination and my knowledge as a structural engineer, it was and remains my expert opinion that the estimated costs to remediate the Party Wall for damage directly caused by the demolition and removal of the building at 324 Neville Street as of November 17, 2016, was $242,600, an amount that I believe has increased with the increases in the costs of construction goods and services since November 17, 2016.

A.R. 0283.

It is undisputed in the facts obtained in discovery that the party wall is integral to the structure on the Subject Property. A.R. 0636. According to Shorts, the exposure of and damage to the party wall rendered Birchfield's building uninhabitable. A.R. 0639. Because of it her basement floods. A.R. 0277, 0279, 0280. Despite Birchfield's demands and this civil action, neither Respondents nor their insurers have taken any steps to repair or replace the party wall. At her expense, Birchfield has hired contractors to evaluate and attempt repairs, but to no avail. She has spent nearly $200,000 on these efforts. A.R. 0281. Further work on the building would be futile, Birchfield finally concluded. A.R. 0281. Birchfield cannot afford the repair. A.R. 0281-0282. The building remains unusable and is a complete economic loss. A.R. 0278 ("It's a dead asset.")

Petitioner sought damages against Respondents for breach of tort duties arising under negligence standards and party wall obligations that Petitioner categorizes within the laws or principles of servitudes. The nature and extent of the party wall servitudes are at the heart of Petitioner's appeal from the lower court's pre-trial rulings, including on cross dispositive motion, that articulated party wall duties as the law of the case.

Before trial, the circuit court, declaring no controlling authority fixing duties in the law of party walls, announced new rules in its December 13, 2019, order:

> Since there are no statutes in West Virginia pertaining to party walls, the case law in West Virginia dealing with party wall rights and duties is limited. Therefore the Court was required to look to other jurisdictions for guidance in determining the governing law in this case.
>
> In *Lambert v. City of Emporia,* 616 P.2d 1080, 5 Kan.App.2d 343 (1980), the Court of Appeals of Kansas was confronted with a situation very similar to the present case. In Lambert the parties were the owners of adjacent buildings with a shared common wall or party wall. *Id.* At 1082. The City of Emporia caused its building to be razed so that it could construct a new building on its property. The City did not provide the adjoining owner with notice of its intention to demolish its building prior to the actual demolition. After

demolition, the City took no steps to modify, improve or repair the "party wall" and the party wall was left exposed to the elements. *Id.*

The Lamberts, the adjoining property owners filed suit claiming that the City negligently and recklessly caused damage to their property. The Kansas court, citing cases from Kentucky, Nebraska, Ohio, Pennsylvania, Washington, and Tennessee, as well as referencing 2 *Thompson on Real Property* (1980) and *American Jurisprudence 2d, Party Walls*, determined that cases uniformly hold:

"That the owner of a building having a party wall may remove his building *without liability to the adjoining owner* so long as he gives notice of the removal to the adjoining owner and uses reasonable care to protect the structural integrity of the party wall and avoid damage to the adjoining owner's building resulting from the removal. This rule applies even though removal of the building leaves the party wall exposed to the elements or unsightly. *Id.* at 1083. (Citations omitted) (Emphasis added).

This Court, in reviewing the information contained in the pleadings and the evidence as presented in support of the various motions or responses to the motions, finds as a matter of law that in West Virginia a party that owns a building that shares a party wall with an adjoining property owner is entitled to remove his building without liability to the adjoining owner, so long as the adjoining owner is given notice of the intended removal and the removal is done with reasonable care to protect the structural integrity of the party wall and is done in a matter to avoid damage to the adjoining property owner's building and its contents.

In the present case, the Plaintiff has failed to identify the party or person(s) that undertook removal of the damaged building on the Defendants' side of the party wall. While this Court has taken the position that notice is a necessary element, the Court relaying once again upon *Lambert v. City of Emporia* finds that the requirement of notice is only applicable to the actual owner of the building at the time that the building is removed. *Lambert v. City of Emporia*, at p. 1083. In the present case, the Plaintiff has not alleged that she was damaged by the failure of any Defendant to provide notice of the intended removal of the burned building

The next question that this Court must address is 'what duty does a property owner have to protect a party wall which is left unprotected after the owner removes his building from the party wall?

> The Court is guided in this analysis by *Cameron v. Perkins*, 76 Wn.2d 7, 454 P.2d 834 (Washington 1969). In Cameron, the Supreme Court of Washington was faced with a similar question. After reviewing cases from Michigan, Iowa, Utah, New York, Virginia and Nebraska, as well as 40 American Jurisprudence, Party Walls, and 2 Thompson on Real Property, the Washington Court adopted the majority view that adjoining property owners have the right to remove their building(s) "without liability for the resulting damage to the other if such party gives proper notice of the removal to the other party and uses reasonable care and caution to protect the wall and remaining building.' *Id.*
>
> In *Cameron*, the Court was required to determine what duty a party has to protect the party wall after the removal of that party's building. In Cameron, as in this case, the removal of the building left the party [wall] exposed to the elements. In both cases, the party wall had functioned as an 'interior' wall for each of the adjoining buildings and was not designed or intended to be an 'exterior' wall that was exposed to the elements.
>
> The Court in *Cameron* cited 2 *Thompson on Real Property*, §403 at 629 (1961) which states:
>
> One removing a building is under no obligation to protect a party wall against rain nor is he required to protect the wall by permanently covering it against the elements.' 2 *Thompson on Real Property*, §403 at 629 (1961).
>
> Based upon an analysis of cases from the above jurisdictions and the other legal authority, including a review of 40 *Am. Jur.*, *Party Walls*, the Cameron court concluded:
>
> ". . . it is clear that appellant has *no duty to protect* respondent's interior wall from the elements. The *only duty* which appellant must observe is that he exercise reasonable care and caution in removing his wall so as not to add to the unstable condition of the remaining interior wall." *Cameron v. Perkins*, at p. 16 (Emphasis added)

Order Pertaining to Pre-Trial Motions and Motions for Summary Judgment at A.R. 0947-0950

After announcing the new rule, the circuit court on cross-motions for summary judgment, denied Petitioner's motion for summary judgment seeking liability on party wall obligations against Respondents while also granting Respondents' motions for summary judgment on the same

issue. The circuit court retained for trial the only remaining count in Petitioner's case, negligence against Respondent, Zen's Development, the current owner of Lot 5, now vacant, and then only on the issue whether Zen's Development negligently filled in the land causing water to penetrate Petitioner's basement.

During a January 3, 2020, hearing including colloquy on his pre-trial order, the lower court declined to distinguish or find that the party wall in issue is structural. A.R. 0982-0989.

Petitioner moved the circuit court to certify the questions on party wall duties to the Supreme Court of Appeals before trial, arguing that Birchfield would face the great expense and inefficiency of trying the same facts twice should she prevail after a trial on negligence and later on party wall duties.

The circuit court denied Petitioner's motion to certify but declared in its January 3, 2020, Order "that the appropriate process of addressing this Court's adverse ruling is to appeal the matter to the Supreme Court of Appeals of West Virginia on appropriate issues that are appealable."

Petitioner so appealed.

Standard of Review

The standard of review for this Court under Rule 41(b) of the West Virginia Rules of Civil Procedure is to determine whether the ruling of the Circuit Court constituted an abuse of discretion. *Tolliver v. Maxey*, 218 W.Va. 419, 624 S.E.2d 856. This appeal also involves questions of law and statutory interpretation both of which involve application of a "*de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Discussion
Assignment of Error I

The Circuit court erred when it concluded: "Since there are no statutes in West Virginia pertaining to party walls, the case law in West Virginia dealing with party wall rights and duties is limited.

Therefore the Court was required to look to other jurisdictions for guidance in determining the governing law in this case."

In its January 3, 2020 Order, the Circuit court concluded: "Since there are no statutes in West Virginia pertaining to party walls, the case law in West Virginia dealing with party wall rights and duties is limited. Therefore the Court was required to look to other jurisdictions for guidance in determining the governing law in this case." For the law of the case, the Circuit court fashioned a new rule on party wall obligations based on cases in Kansas and Washington that conflict with West Virginia precedents and servitude principles. The Circuit court erred in looking to other jurisdictions when West Virginia's party wall jurisprudence, albeit small, expresses principles, when extended, provide the correct standards of care for party wall obligors.

Despite the lower court's statement, West Virginia's jurisprudence in the law of party walls contains precedents that adequately define the nature and extent of party wall obligations as the products of servitude relationship. In West Virginia, "[a] 'party wall,' in the legal sense of the term, can only exist in two ways, *i.e.*, by contract or statute: the common law creates no such right." Syl. Pt. 1, *List v. Hornbrook*, 2 W. Va. 340 (1867) (But "[s]uch right might arise by prescription." *Id.*)[5]. West Virginia has no party wall statute. "Party walls are as a general rule the

[5] Traditionally, there are four legal theories of the nature of a party wall:

> Treatises and adjudicated cases often refer to the discussion of the English jurist, Justice Fry, in his decision in Watson v. Gray, 14 Ch. 194. Fry explained: "The words appear to me to express a meaning rather popular than legal, and they may, I think, be used in four different senses. They may mean, first, a wall of which the two adjoining owners are tenants in common, as in *Wiltshire v. Sidford*, (1 Man. & Ry. 404), and *Corbitt v. Porter*, (8 B. & C. 257, 265). I think that the judgments in those cases show that that is the most common and primary meaning of the term. In the next place the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighboring owners, as in *Matts v. Hawkins,* (5 Taunt. 20). Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in some of the building

subject of agreement, express or implied, between adjoining owners." Syl. Pt. 1, *Gates v. Friedman*, 83 W. Va. 710, 98 S.E. 892 (1919). "Where adjoining owners are grantees of a common grantor, and the deed to the first conveys to him to the center line an equal moiety in the wall of the building on the adjoining lot divided longitudinally, with the right and authority to use said wall as a part of the building to be constructed by him, and the deed to the other grantee conveys to him the said adjoining lot and the building thereon to the center line of said dividing wall, subject only to the rights of the first grantee, cross easements in the whole of said wall are thereby reserved and vested in each grantee, and said wall is thereby constituted a party wall, and each is entitled to make use thereof as a party wall." *Id.* at Syl. Pt. 2; Syl. Pt. 1, *Gates v. Friedman*, 83 W. Va. 710, 98 S.E. 892 (1919).

The party wall relationship in this case is the same as described in *Gates v. Friedman.* The two 1919 deeds creating the relationship resulted in one half ownership in which the boundary between Lots 4 and 5 constitutes the center line dividing the wall, with cross easements (although not described as such) "in the whole" of the wall "thereby reserved and vested in each grantee".

> acts. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favor of the owner of the other moiety.' This last is the sense in which the term is more frequently used in the United States. Jones on Easements § 632. *See also Rudall on Party Walls,* 1, *Carson's Gale on Easements* (9th ed.) § 406. Taking from Justice Fry, *Black's Law Dictionary* (5th ed.) similarly explains "party wall": "In the primary and most ordinary meaning of the term, a party-wall is (1) a wall of which the two adjoining owners are tenants in common. But it may also mean (2) a wall divided longitudinally into two strips, one belong to each of the neighboring owners; (3) a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements (the term is so used in some of the English building acts); or (4) a wall divided longitudinally into two moieties, each moiety being subject to a cross-easement in favor of the owner of the other moiety."
>
> *Gates v. Friedman*, 83 W. Va. 710, 714-715 98 S.E. 892, 893-894 (1919).

Cross-easements in a single party wall embrace both mutual benefits (that is, to incorporate the wall into the structure of each adjoining building) and mutual obligations. It is the lower court's truncated understanding of the mutual obligations that has deviated from West Virginia law. In West Virginia, if a contract creating a party wall relationship is silent on rights or duties then West Virginia courts have supplied them. "Such agreement must be construed with reference to the conditions in and the construction of the building at the time the party-wall agreement was made." Syl. Pt. 2, *A. W. Cox Dep't Store v. Solof,* 103 W. Va. 493, 138 S.E. 453 (1927).

A right to hang a building on a party wall must include the right that the other building owner take reasonable steps to protect its half of the wall from failing. Every right of an owner in a party wall relationship imposes a corresponding obligation on the other owner. For example, the *Gates* court held that one of two adjoining owners had the inherent right to increase the height of their party wall "if it can be done without injury to the adjoining building." *Id.*, 83 W. Va. at 716, 98 S.E. at 894. In the absence of terms in the written agreement, the *Gates* court supplied harmonizing terms in its resolution of the dispute: both the right to increase the height of a party wall and the corresponding obligation on the exercise of that right "if it can be done without injury to the adjoining building." In a concurrence in *List v. Hornbrook* 2 W. Va. 340 (1867), Justice Brown wrote: "I admit that a party wall may exist in this State, but it must arise from contract express or implied, or from prescription, *and after the wall obtains that character, but not before, equity will raise the duty and liability to keep the same in repair . . .*" (Emphasis supplied).

In *Johnson v. Chapman,* 43 W. Va. 639, 28 S.E. 744 (1897), the Supreme Court determined joint or several liability among three party wall obligors. Of the group, the Supreme Court targeted two defendants, Hutchison and Chapman

> whose duty it was to repair and strengthen [a party wall], wrongfully and unjustly permitted the said party wall to be and continue unsafe,

> etc., and that the defendant Hutchinson, whose duty it was to repair and strengthen the southern or outside wall of his warehouse, suffered and permitted the same to be and continue unsafe, etc., by reason whereof the said walls and the said warehouses fell, and in falling crushed into and knocked down and destroyed the walls, etc., of Elizabeth Turner's warehouses. From these allegations it may be gathered that the defendants were severally, and not jointly, guilty of the negligent acts charged, namely, that of not repairing and strengthening their respective walls; but whether these acts, although several, concurred, each as an efficient, proximate cause, in producing the injury complained of, cannot be ascertained therefrom."

Our Supreme Court continued to explain the mutual corresponding liabilities of party wall obligors "A strong pillar and a weak one may support a wall, but if they are both weak, the wall will fall. Two separate persons are obligated to make each pillar strong. If either does his duty the wall may stand; but if each neglects his duty and the wall falls, they are jointly and severally liable for the injury that follows to anyone. As each contributed to the injury they are each liable for the whole injury, and therefore can be sued jointly without in any wise increasing their separate liabilities." *Johnson v. Chapman*, 43 W. Va. 639, 28 S.E. 744 (1897).

In addition, insurance cases show that a damaged party wall in West Virginia is a compensable and, thus, insurable interest for the adjoining party wall owner. Our Supreme Court took up the enforceability of an arbitration provision under an insurance policy in a case in which insurance proceeds from one building's casualty loss were used to repair a damaged party wall for the benefit of the adjoining building. *See Mutual Improvement Co. v. Merchants' & Business Men's Mut. Fire Ins. Co.*, 112 W. Va. 291, 164 S.E. 256 (1932). The Supreme Court wrote: "All they were required to do was to ascertain the sound value of the building at the time of the fire, and the damages or loss occasioned by the fire. This, their award did, and it furnishes a basis for the calculation of defendant's proportionate liability." 112 W. Va. 292, 164 S.E. at 257. *Also see*, *Niagara Fire Ins. Co. v. Raleigh Hardware Co.*, 62 F.2d 705 (4th Cir. 1933) (in which the Circuit

Court of Appeals noted that arbiters for adjusting for the fire loss included "damage to a certain party wall").

None of these impressed the circuit court that real rights and duties arise out of a party wall relationship even one of the buildings suffers a loss. Despite Birchfield's briefing on these West Virginia cases, the lower court declined to recognize them as binding in or extended to the facts of the instant case. Thus, the Circuit court below erred when it found insufficient principles in West Virginia decisional law to supply the law of the case on nature and scope of party wall obligations.

Instead, the lower court, after adopting a new rule taken from *Cameron v. Perkins*, 76 Wn.2d 7, 454 P.2d 834 (Washington 1969), claimed that "the Supreme Court of Washington was faced with a similar question." A.R. 0949.

The lower court continued:

> After reviewing cases from Michigan, Iowa, Utah, New York, Virginia and Nebraska, as well as 40 *American Jurisprudence, Party Walls*, and *2 Thompson on Real Property*, the Washington Court adopted the majority view that adjoining property owners have the right to remove their building(s) 'without liability for the resulting damage to the other if such party gives proper notice of the removal to the other party and uses reasonable care and caution to protect the wall and remaining building." *Id.* at 17.
>
> In *Cameron*, the court was required to determine what duty a party has to protect the party after the removal of that party's building. In *Cameron,* as in this case, the removal of the building left the party exposed to the elements. In both cases, the party had functioned as an 'interior' wall for each of the adjoining buildings and was not designed or intended to be an 'exterior' wall that was exposed to the elements.
>
> The Court in *Cameron* cited *2 Thompson on Real Property*, §402 at 629 (1961) which states:
>
> 'One removing a building is under no obligation to protect a party wall against rain nor is he required to protect the wall by permanently covering it against the elements.' *2 Thompson on Real Property*, § 403 at 629 (1961).

A.R. 0949-0950.

There is major contradiction in the lower court's January 3, 2020, order. In relying on *Cameron*, the lower court claims that "the Washington Court adopted the majority view that adjoining property owners have the right to remove their building(s) 'without liability for the resulting damage to the other *if such party gives proper notice of the removal to the other party and uses reasonable care and caution to protect the wall and remaining building.*" A.R. 00949-0950 (Emphasis supplied). The *Cameron* rule acknowledges the right to remove a building subject to a party explicitly while imposing the corresponding duties to (1) give proper notice of its removal; (2) to use reasonable care and caution in removing the building and (3) to protect the "wall and remaining building". This would be a reasonable articulation of existing West Virginia law or an extension of it.

The lower court adopts yet another rule from *Thompson on Real Property* that one party wall obligor is "under no obligation to protect a party wall against rain nor is he required to protect the wall by permanently covering it against the elements." This new rule taken from *Thompson on Real Property* clashes with West Virginia precedents. First, the lower court failed to consider our Supreme Court's directive a party wall agreement "must be construed with reference to the conditions in and the construction of the building at the time the party-wall agreement was made." Syl. Pt. 2, *A. W. Cox Dep't Store v. Solof,* 103 W. Va. 493, 138 S.E. 453 (1927). In addition, the loss of one building subject to a party wall agreement does not terminate the agreement or the relationship. *See, e.g., Morrison Department Store Co. v. Lewis*, 95 W. Va. 277, 285, 122 S.E. 747, 750 (1924). A rule that a party wall owner is "under no obligation" to protect a party wall against rain or the elements directly contradicts the conditions in and the construction of the two buildings in issue in this case. In 1919, the parties constructed two buildings with a structural party in a

manner that served both well for 90 years. In the instant case, the lower court completely ignored the "conditions in and the construction of the building" in 1919 when the adjoining owners entered into the party wall relationship that they clearly agreed with run with the land. A.R. 0118 and A.R. 0119.

Second, the lower court completely ignored the guidance of this Court's holdings in *Johnson v. Chapman*, 43 W. Va. 639, 28 S.E. 744 (1897) imposing on party wall owners the mutual obligations to make the wall "strong": "A strong pillar and a weak one may support a wall, but if they are both weak, the wall will fall. Two separate persons are obligated to make each pillar strong. If either does his duty the wall may stand; but if each neglects his duty and the wall falls, they are jointly and severally liable for the injury that follows to anyone. As each contributed to the injury they are each liable for the whole injury, and therefore can be sued jointly without in any wise increasing their separate liabilities." 43 W. Va. at 644; 28 S.E. at 746.

The lower court erred in ignoring West Virginia precedents and the principals of party wall obligations expressed in them. The lower court imposed a new rule that arbitrarily cuts off the purposes and expectations of the original owners who agreed to building a party wall for their mutual benefit at their mutual expense. It is West Virginia law that imposes, to the extent their written agreement is silent on the matter, their mutual obligations to maintain and protect the party even if one of them no longer wants or needs the party wall. If one owner no longer needs the benefit of the party wall relationship, then that alone cannot cut off the right of the other owner to enjoy the expectation of the same relationship.

This is not a radical idea. It is a rather conventional understanding of property rights. Other jurisdictions have extended this particular duty of party wall owners not to injure each other and to protect the other's interest in the party wall. In a party wall relationship in Indiana, "[e]ach

proprietor owes to the other a duty to do nothing that shall weaken or endanger the party wall, although each may rightfully, when he thinks it for his own interest to do so, increase its height, sink the foundations deeper, or, on his own side, add to it, yet it seems that, in doing so, he is an insurer against damages to the other proprietor." *J. C. Penney Co. v. McCarthy*, 93 Ind. App. 609, 93 Ind. App. 609, 616, 176 N.E. 37, 640 (1931)(citing 2 *Cooley, Torts* (3d ed.) § 750. In *J. C. Penney Co.*, the retailer dug, excavated, removed and hauled "away the earth (etc.) to the depth of six to eight feet" of a party wall," causing it to weaken and collapse." 176 N.E. at 638.

"So long as the wall serves its purpose and is of benefit to the defendant, the plaintiff has no right to destroy it." *Carroll Blake Const. Co. v. Boyle*, 140 Tenn. 166, 175, 203 S.W. 945, 946 (Tenn. 1918). "When, by reason of fire or other casualty, it becomes useless to either owner, neither would have the right to prevent its removal. No one will be permitted to maintain a nuisance. While, however, it is sufficient for the support of the house of one of the owners, the other cannot impair or remove it. To permit this thing to be done would be confiscation of another's property." *Id.* (citations omitted.)

Following *Carroll Blake Const. Co.*, a Tennessee intermediate court of appeals court acknowledges the mutual duties of party wall obligors, beyond a negligence-based duty, to insure against damage to the wall. The "[r]ule that plaintiff pleading negligence generally and also specific acts of negligence must recover, if at all, on specified acts pleaded, did not apply in action for damages caused by collapse of party wall, since defendants, adjoining owners, were insurers against damages to plaintiff." *Murray v. Patterson*, Syl. Pt. 9, 18 Tenn. App. 30, 72 S.W.2d 558 (C.A. Tenn. 1934). Whether Respondents are negligent does not matter: "It follows from the principles we have stated and the authorities cited, that, if the work done by defendants caused the party wall to collapse, the defendants are liable to plaintiff for whatever damages she has suffered

thereby, without regard to the negligence or nonnegligence of the defendants in the manner of doing the work." 72 S.W.2d at 562-3 (emphasis supplied).

Party Wall Principles Understood in the Law of Servitudes

Birchfield below framed these mutual rights and obligations as a class of the law of servitudes[6]. The lower court declined to consider them as such. Birchfield respectfully suggests that this Court now take the opportunity to clarify West Virginia's existing party walls principles within and as a part of the law of servitudes.[7] This makes great sense. *Black's Law Dictionary* defines "servitude" as "[a] charge or burden resting upon one estate for the benefit or advantage of another; a species of incorporeal right derived from the civil law (see Servitus) and closely corresponding to the "easement" of the common-law, except that 'servitude' rather has relation to the burden of the estate burdened, while 'easement' refers to the benefit or advantage or the estate to which it accrues." (5th Ed. 1979). The drafters of *Restatement Third, Property (Servitudes)* define "Servitude" in § 1.1 as follows[8]:

> (1) Servitude is a legal device that creates a right or an obligation that runs with land or an interest in land.
>
> (a) Running with land means that the right or obligation passes automatically to successive owners or occupiers of the land or the interest in land with which the right or obligation runs.
>
> (b) A right that runs with the land is a called a 'benefit' and the interest in land with which it runs may be called the 'benefited' or 'dominant' estate.
>
> (c) An obligation that runs with land is called a 'burden' and the interest in land with which it runs may be called the 'burdened' or 'servient' estate.

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[6] "*Servitus oneris ferendi*" means "The servitude of bearing weight; the right to let one's building rest on the building, wall, or pillars of one's neighbor." *Black's Law Dictionary* (5th Ed. 1979).

[7] "A servitude creates both a burden and a benefit." Comment c, § 1.1 *Restatement Third, Property (Servitudes).*

[8] "Servitudes may be used whenever an arrangement that does not require renegotiation on transfer of the land is desired." *Introductory Note, Chapter 1, Definitions, Restatement Third, Property (Servitudes).*

Restatement Third, Property (Servitudes) § 1.1.

It is obvious that a party wall relationship is one constituting mutual and equal servitudes, that is, it confers mutual rights in and imposes mutual duties on the owners of adjoining buildings in which a single wall is integrated into the structures of both buildings for their mutual advantage.

"Except as limited by the terms of the servitude determined under § 4.1, the holder of an easement or profit as defined in § 1.2 is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude. Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment. *Restatement Third, Property (Servitudes)* § 4.10, *Use Rights Conferred by a Servitude.*

The drafters' comments to § 4.10 amplify the mutuality of benefits and obligations where there exists a servitude:

> Comment g. Unreasonable damage to servient estate. Unless the parties have agreed otherwise, the holder of an easement is not entitled to cause unreasonable damage to the servient estate. Because the holder of an easement is generally entitled to enter the servient estate to make improvements and construct improvements, a certain amount of damage or inconvenience to the servient estate may be within the contemplation of the parties. However, under the rule stated in this section, the servitude owner is not entitled to cause any greater damage than that contemplated by the parties, or reasonably necessary to accomplish the purposes of the servitude. Unless clearly contemplated by the parties, it is not assumed that the servient owner intends to permit the easement owner to remove existing structures or terminate existing uses of the servient estate."
>
> Comment h. Unreasonable interference with enjoyment of servient estate. The general principle that, where the parties have not agreed

> otherwise, the servitude should be interpreted to reach a fair balance of their interests leads to the rule that the easement holder may not use it in such a way as to interfere unreasonably with enjoyment of the servient estate. What constitutes unreasonable interference will depend largely on the circumstances, particularly the purpose for which the servitude was created and the use of the servient estate made or reasonably contemplated at the time the easement was created. In determining what constitutes unreasonable interference with the enjoyment of the servient estate, aesthetic considerations may be relevant. Unless the circumstances should that the parties intended that an existing use of the servient estate change or terminate when servitude was granted, the servitude holder is not entitled to interfere with existing uses of the servient estate.

Restatement Third, Property (Servitudes) § 4.10.

In § 4.13, *Duties of Repair and Maintenance*, the *Restatement Third, Property (Servitudes)* states:

> Unless the terms of a servitude determined under § 4.1 provide otherwise, duties to repair and maintain the servient estate and the improvements uses in the enjoyment of a servitude are as follows:
>
> (1) The beneficiary of an easement or profit has a duty to the holder of the servient estate to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary's control, to the extent necessary to
>
> (a) prevent unreasonable interference with the enjoyment of the servient estate, or
>
> (b) avoid liability of the servient-estate owner to third parties.
>
> (2) Except as required by § 4.9, the holder of the servient estate has no duty to the beneficiary of an easement or profit to repair or maintain the servient estate or the improvements used in the enjoyment of the easement or profit.
>
> (3) Joint use by the servient owner and the servitude beneficiary of improvements used in enjoyment of an easement or profit, or of the servient estate for the purpose authorized by the easement or profit, gives rise to an obligation to contribute jointly to the costs reasonably incurred by repair and maintenance of the portion of the servient estate or improvements used in common.

> (4) The holders of separate easements or profits who use the same improvements or portion of the servient estate in the enjoyment of their servitudes have a duty to each other to contribute to the reasonable costs of repair and maintenance of the improvements or portion of the servient estate.

In Comment b to § 4.13, the drafters explain the servitude holder's duty to repair and maintain:

> Under the rule stated in § 4.10, the holder of an easement or profit is entitled to make any use of the servient estate that is reasonable for enjoyment of the servitude, including the right to construct, improve, repair, and maintain improvements are reasonably necessary. The right of the easement or profit owner is qualified, however, by the general principle that the use may not interfere unreasonably with the enjoyment of the servient estate. The rule stated in this subsection elaborates that general principle by providing that the servitude beneficiary has a duty to repair and maintain those portions of the servient estate, and the improvements used in enjoyment of the easement or profit, that are under the beneficiary's control, to the extent necessary to prevent unreasonable interference with the servient estate.

Party Walls Are Mutual Servitudes

Party wall arrangements are mutual servitudes, with mutual benefits and mutual burdens. The Party Wall Agreement in the instant case imposed mutual servitudes on a single, jointly owned structural wall. By operation of law, expressed in the jurisprudence of West Virginia, the Party Wall Agreement conferred mutual rights (benefits) on Lots 4 and 5 and imposed corresponding mutual duties (obligations) on the owners of Lots 4 and 5 to maintain the party wall for its original and persisting purpose.

The lower court has created a tangled ball of new rules that contradict and undermine West Virginia's law of party wall as class of the law of servitudes. In so doing, the circuit court has so constrained Petitioner that she has been denied remedies for Respondents' proved impairment of her property rights in the party wall that is integral to the structure of her building. The lower court's rulings have rendered her property rights in the party wall and, by extension, her building truly worthless. Contrary to the lower court's rulings, West Virginia law does not allow one party

wall obligor to abandon its duties and obligations to protect Petitioner's half of the party wall by failing to protect its half of the party wall from deteriorating to its inevitable collapse.

Assignment of Error II

The Circuit court erred when, in adopting party wall duties from Kansas and Washington State for the common law of West Virginia and then applying them in this case, it conflated two separate and distinct party wall duties into a single duty.

Borrowing from Kansas and Washington, the lower court fashioned this rule as the law of the case for party walls duties arising under West Virginia law: "[A]s a matter of law that in West Virginia a party that owns a building that shares a party wall with an adjoining property is entitled to remove his building without liability to the adjoining owner, so long as the adjoining property [owner] is given notice of the intended removal and the removal is done with reasonable care to protect the structural integrity of the party wall and is done in a manner to avoid damage to the adjoining property owner's building and its contents."

This new rule improperly sanctions one party wall obligor's termination of a perpetual party wall relationship without penalty. Apart from that improper outcome, if one owner wishes to abandon its party wall obligations (even though they run with the land) the new rule contains only three steps to effect a termination of its obligations: (1) the duty to give notice of its intent to remove its building; (2) to duty to protect the structural integrity of the party wall; and (3) the duty to avoid damage to the property owner's building and its contents. If a party wall obligor performs these duties, as the lower court ruled below, then in effect the party wall agreement or relationship is terminated, leaving the other obligor holding the bag.

Apart from this incorrect expression of West Virginia law, the lower court then applied its new rule in a way that conflated the duties described in (2) and (3). In fact, as Petitioner's expert structural engineer has testified, Respondents did not perform their duty to "remove" the building

"with reasonable care to protect the structural integrity of the party wall. Further, Respondents did not "avoid damage to the property owner's building and its contents" including preserving the structural integrity of Respondents' one half of the party wall. Respondents' failure to protect its one half of the party wall has caused direct and proximate damage to the structural integrity of Petitioner's one half of the party wall. In addition, Respondents directed water through the party wall into the basement of Petitioner's building. This evidence is uncontested.

Putting aside whether notice was given, the lower court failed to property apply its new rule to the facts in the case. Had it done so, it could only have ruled in favor of Petitioner based on the uncontested testimony and opinion of her expert structural engineer.

Assignment of Error III

The Circuit court erred when it found that the party wall in the instant case is not structural because Petitioner's uncontested expert testimony is that the party wall is structural.

In this case, there is uncontested testimony and opinion of Petitioner's expert structural engineer that the party wall is structural. Indeed, none of the parties dispute that the party wall was or remains structural. Yet, the circuit court erred when it found in its January 3, 2020, order that the party wall in the instant case is not structural. In its order, the lower court, after adopting new rules taken from *Cameron v. Perkins*, 76 Wn.2d 7, 454 P.2d 834 (Washington 1969) and *2 Thompson on Real Property*, claimed that "the Supreme Court of Washington was faced with a similar question." A.R. 0949. "The lower court continued:

> After reviewing cases from Michigan, Iowa, Utah, New York, Virginia and Nebraska, as well as 40 American Jurisprudence, Party Walls, and 2 Thompson on Real Property, the Washington Court adopted the majority view that adjoining property owners have the right to remove their building(s) 'without liability for the resulting damage to the other if such party gives proper notice of the removal to the other party and uses reasonable care and caution to protect the wall and remaining building." *Id.* at 17.

> In *Cameron*, the court was required to determine what duty a party has to protect the party after the removal of that party's building. In *Cameron,* as in this case, the removal of the building left the party exposed to the elements. In both cases, the party had functioned as an 'interior' wall for each of the adjoining buildings and was not designed or intended to be an 'exterior' wall that was exposed to the elements.
>
> The Court in *Cameron* cited *2 Thompson on Real Property*, §402 at 629 (1961) which states:
>
> 'One removing a building is under no obligation to protect a party wall against rain nor is he required to protect the wall by permanently covering it against the elements.' 2 Thompson on Real Property, § 403 at 629 (1961).
>
> A.R. 0949-0950.

The lower court fashioned a rule for the instant case that finds (or at least is based on the premise) that the party wall in question is not a structural party wall. The circuit court drew a false and irrelevant distinction between the party wall's serving as an "interior" wall while the building on Lot 5 existed and, then, when the building removed, its becoming an "exterior wall". The distinction has no bearing on the case. First, the party was built to serve as a structural wall for both buildings and intended to be structural, integral to both buildings. The duty to protect the party wall, whether interior or exterior one, remains intact irrespective that it becomes an exterior one. Second, the party wall, as Birchfield's expert has testified, was not designed to be exposed to water and the elements. As the original owners had contemplated, the party wall would have remained an interior one but for the fire that burned the building on Lot 5. Exposing an interior structural wall to water and the elements does not magically transform it into an exterior structural wall. The Court of Appeals of Missouri provides helpful guidance:

> When connecting structures are not interdependent—that is, each maintains an individual physical integrity and each functions independently of the other — then they are separate structures. *Id.* The court found that the best gauge of this separateness is the

> presence and quality of structural walls. *Id.* It concluded that structures are separate when the connecting walls meet the following standards: (1) The walls run continuously from the basement foundation to the roof with not structure-to-structure openings; and (2) The walls are load or weight-bearing, with the strength and stability to allow for the collapse of the structure on either side of the wall without the collapse of the wall itself or the structure on the other side.

Lucas-Hunt Village Assocs., Ltd. Pshp. v. State Tax Comm'n, 966 S.W.2d 308, 311 (citing *Morton v. Brenner*, 842 S.W.2d 538, 541-42 (Mo. banc. 1992).

Contrary to the lower court's understanding, the party wall in issue in this case is a structural party wall irrespective that it is an interior or exterior wall. A structural wall entails the capacity to hold up the floors and roofs of a building while remaining protected for water and the elements.

Assignment of Error IV

The Circuit court erred when it concluded that the burning of a building subject to party wall servitudes as a matter of law fulfills that building owner's the duty to "give notice of the intended removal" of his building to the other party wall owner.

During its January 3, 2020, pre-trial hearing, the lower court laughed at Petitioner's objection to its ruling that the fire or casualty loss of a building alone constituted proper notice to Petitioner under the court's newly minted rule. A.R. The circuit court expressed mild dismay. And yet, Respondent McBride did not give Petitioner any notice of his plans after the building on Lot 5 burned down. Respondent McBride received insurance proceeds from his loss. He could have decided to rebuild with the insurance proceeds. Or it appears that he kept the proceeds or least the balance not required to pay to clear the site away. With notice of his decision, Birchfield could have made a claim against the Respondent McBride's insurance proceeds to repair or protect the party wall.

The lower court incorrectly ruled that a fire or casualty loss of a building subject to a party wall constitutes notice for purposes of its new rule.

Assignment of Error V

The Circuit court erred when it found that "[i]n the present case, the Plaintiff has failed to identify the party or person(s) that undertook the removal of the damaged building on the Defendants' side of the party wall."

The uncontested evidence of Birchfield directly opposes Assignment of Error VI. To the contrary, Respondent McBride fully admits in his responsive pleadings and discovery that he through his agent, CLC Enterprises, removed the damaged building on Lot 5, exposing his side of the party wall to the elements. The Court's finding on this point is false and had not been in dispute until the Court made it so in it December 13, 2019, order. Summary judgment on this issue, at best, was premature because as trier of fact the Circuit court did not see or hear Petitioner's evidence on the issue.

Assignments of Error VI, VII, VIII and IX

The Circuit court erred when it entered summary judgment in favor of Respondent McBride whether (1) McBride "use[d] reasonable care to protect the structural integrity of the party wall" and (2) McBride "avoid[ed] damage to the adjoining owner's building resulting from the removal" because the lower court had not heard the testimony of Petitioner's expert witness.

The Circuit court erred when it failed to enter summary judgment in favor of Petitioner that Respondent McBride failed to (1) to "use reasonable care to protect the structural integrity of the party wall" and (2) to "avoid damage to the adjoining owner's building resulting from the removal" — embracing two separate and distinct party wall duties — because the testimony of Petitioner's expert witness on these two matters of scientific opinion is undisputed.

The Circuit court erred when it entered summary judgment in favor of Respondents McBride and Uptown Properties on Petitioner's negligence claim on the incorrect finding that those Respondents had no duty to Petitioner to protect Respondents' one half of the party wall from the elements and thus ultimate failure and collapse.

The Circuit court erred when it entered summary judgment in favor of Respondents McBride, Uptown Properties and Zen's Development on Petitioner's party wall claim on the incorrect

finding that those Respondents had no duty to Petitioner to protect Respondents' one half of the party wall from the elements and thus from failure and ultimate collapse.

Assignments of Error VI, VII, VIII and IX are interrelated. They assert errors committed by the lower court in its pre-trial orders in relation to Petitioner's and Respondents' cross motions for summary judgment on party wall duties and negligent duties under Rules 56(a) and 56(b) of the West Virginia Rules of Civil Procedure Even applying the lower court's new liability rule to the case, it would have to have entered summary judgment in favor of Petitioner on breach of party wall duties. Petitioner's expert structural engineer, Daniel R. Shorts, issued a number of uncontested opinions that Respondents' failure to protect the party wall from water and the elements is the direct and proximately cause of damage to the party wall and to Petitioner's building. Further, Mr. Shorts testified that surface water from Lot 5 is the cause of flooding in her basement. In sum, Mr. Shorts opined that Respondents failed (1) to "use reasonable care to protect the structural integrity of the party wall" and (2) to "avoid damage to the adjoining owner's building resulting from the removal" of the party wall.

If Petitioner is entitled to summary judgment on liability, as Assignments of Error VI and VII state, then, the lower court should not have granted summary judgment to Respondents on their party wall duties as Assignments of Error VIII and IX state.

Assignment of Error X

The Circuit court erred when it failed to find *prima facie* negligence by each of Respondents because of their violations of the following Ordinances of the city of Beckley:

a. Section 3303.4 Vacant lot. Where a structure has been demolished or removed, the vacant lot shall be filled and maintained to the existing grade or in accordance with the ordinances of the jurisdiction having authority.

b. Section 3303.5 Water accumulation. Provision shall be made to prevent the accumulation of water or damage to any foundations on the premises or the adjoining property.

c. Section 3307.1 Protection required. Adjoining public and private property shall be protected from damage during construction, remodeling and demolition work. Protection shall be provided for footings, foundations, party walls, chimneys, skylights and roofs. Provisions shall be made to control water runoff and erosion during construction or demolition activities . . . [Written notice shall be given to the "owners of adjoining buildings"].

d. 1502.1 Protection Required. Adjoining public and private property shall be protected from damage during construction and demolition work. Protection must be provided for footings, foundations, party walls, chimneys, skylights and roofs. Provisions shall be made to control water runoff and erosion during construction or demolition activities. The person making or causing an excavation to be made shall provide written notice to the owners of adjoining buildings advising them that the excavation is to be made and that the adjoining buildings should be protected. Said notification shall be delivered not less than 10 days prior to the scheduled starting date of the excavation.

Petitioner cited in her reply to Respondents' various motions for summary judgment no less than their violations of Beckley building regulations, codified in City of Beckley Ordinances § 3303.4, 3303.5, 3307.1 and 1501.1 as a basis (among others) for Respondents' liability for breach of tort-based duties to her. Petitioner's expert structural engineer issued opinions based on Respondents' acts and omissions that Respondents did not dispute that comport with standards of care under Beckley building regulations. In West Virginia, "[v]iolation of a statute is *prima facie* evidence of negligence. In order to be actionable, such violation must be the proximate cause of the plaintiff's injury. Syl. Pt. 1, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990)." Syl. Pt. 3, Courtney v. Courtney, 186 W.Va. 587, 413 S.E.2d 418 (1991).

Despite evidence offered in the affidavit of Petitioner's expert structural engineer and his written opinions and Respondents' failure to follow Beckley ordinances, the lower court failed to treat it is a prima facie evidence of negligence when it granted the motions for summary judgment on negligence in favor of Respondents McBride and Uptown Properties.

Assignment of Error XI

The Circuit court erred when it entered summary judgment in favor of Respondents McBride and Uptown Properties on whether they acted reasonably in directing surface water to flow into Petitioner's building on the adjoining lot.

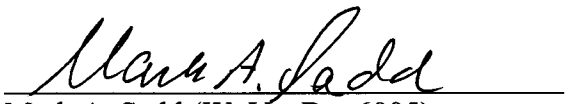
It is inexplicable that the lower court entered summary judgment in favor of Respondents McBride and Uptown Properties on whether they acted reasonably in directing surface water through the party wall and into Petitioner's building. "Generally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact." Syl. Pt. 1, *In Re Flood Litig.*, 216 W.Va. 534, 607 S.E.2d 863 (2004) (citing Syl. Pt. 2, in part, *Morris Associates, Inc. v. Priddy*, 181 W.Va. 588, 383 S.E.2d 770 (1989)). Although the finder of fact, the Circuit court had not heard the testimony of the expert witnesses on reasonableness of the acts and omissions of Respondents McBride and Uptown Properties. At best, there remains a genuine issue of material fact on whether Respondent McBride used reasonable care to protect the structural integrity of the party wall on the post-fire demolition of his building and for which he received insurance proceeds and for which Petitioner did not.

PRAYER FOR RELIEF

Based on the foregoing, Petitioner, Sarah H. Birchfield, prays that this Court reverse each and every error, both legal and factual, described supra and to remand this case to the Circuit Court of Raleigh County with instructions to proceed with the case in accordance with specific directions on each and every error and the law of West Virginia.

Sarah L. Birchfield, Petitioner

By her counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0075

SARAH L. BIRCHFELD,
Plaintiff Below, Petitioner

vs.)

Appeal from a final order
of the Circuit court of Raleigh County (15-C-733)

ZEN'S DEVELOPMENT, LLC,
a West Virginia limited liability company;
UPTOWN PROPERTIES, LLC,
a West Virginia limited liability company; and
KENNETH W. MCBRIDE, JR.
an individual,
Defendant Below, Respondents

CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Plaintiff Sarah L. Birchfield, does hereby certify on this 12th day of June, 2020, that a true copy of the foregoing *Petitioner's Brief* was served upon opposing counsel by U.S. Mail, postage prepaid and by e-mail, upon the following:

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